Filed 12/11/20 Diaz v. Barnes CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ESTEBAN DIAZ, Plaintiff and Appellant, v. JAMES BARNES, Defendant and Respondent.	A157374 (Sonoma County Super. Ct. No. SCV261531)

A client, appellant Esteban Diaz, acting in pro per, sued his former divorce attorney for malpractice, and the attorney, respondent James Barnes, cross-claimed against Diaz for about $68,000 in unpaid legal fees based upon an alleged oral contract between them.[1] The trial court dismissed Diaz's complaint, and then a default was entered against him on his former attorney's cross-complaint. Diaz moved to set aside the default under section 473, subdivision (b) of the Code of Civil Procedure on the basis of inadvertence, surprise, mistake or excusable neglect. The court heard argument on the motion, took it under submission and denied the motion in a written ruling that is not in the appellate record.

[1] His verified complaint alleged seven causes of action, including two for breach of an oral contract, two for common count, two fraud claims, and a cause of action for account stated.

A default judgment was then entered against Diaz for $82,662.18. Diaz then timely filed this appeal.

We affirm.

DISCUSSION

Now represented by counsel, Diaz argues in his opening brief only that the contract with attorney Barnes is void because Barnes did not sign a written retainer agreement with him. He does not argue the trial court abused its discretion in denying him relief from default on the ground of excusable neglect or mistake, nor does he contend that either the default or the default judgment was erroneously entered.

In his respondent's brief, Barnes argues that the opening brief makes no discernible claim of error directed to the entry of the default judgment against Diaz, and that most of the law Diaz cites is simply irrelevant. He concedes no written contract exists, "which has never been in dispute," but argues the (oral) fee agreement was not void but only voidable, and was never voided by Diaz, nor were his claimed fees unreasonable or unconscionable. He also argues that it was proper to enter a default judgment on his alternative cause of action for an account stated.

In his reply brief, Diaz does not respond to Barnes's arguments. Instead he raises an entirely new issue, arguing the trial court erred in approving the amount of the default judgment because Barnes failed to prove the amount he was due because he did not provide all his billing records to the court.

Although there is a strong public policy favoring the adjudication of cases on their merits, and the law requires us to scrutinize more carefully an order under Code of Civil Procedure section 473 denying relief from default than an order granting relief and permitting a case to go forward on the

merits (see generally *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233), " ' "[a] motion to vacate a default and set aside judgment (§ 473) 'is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal.' [Citations.] Moreover, all presumptions will be made in favor of the correctness of the order, and the burden of showing abuse is on the appellant." ' " (*McClain v. Kissler* (2019) 39 Cal.App.5th 399, 413.) Here, Diaz has presented no discernible argument for reversal.

The only legal argument presented in his opening brief consists of about three pages of discussion of the law pertaining to attorney compensation, captioned under an argument heading asserting that his contract with Barnes is "void," with no analysis of how the law applies to the facts here. That is not sufficient to meet his burden on appeal. " 'In order to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record,' " including by " 'explain[ing] how [the law] applies in his case.' " (*United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 162 (*United Grand*) [treating appellate argument as forfeited].) Moreover, as Diaz acknowledges, the lack of a written engagement agreement does not render an attorney fee agreement void but merely "voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." (Bus. & Prof. Code, § 6148, subd. (c).) Diaz has failed to make any fact-based argument either that he voided the oral agreement, or that the fee demanded was not reasonable. Much less

does he explain how such points bear on any error in denying his motion for relief from default[2] and/or in entering a default judgment against him.

We are not required to make arguments for a party or to speculate about arguments a party might intend to raise. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4; *United Grand*, *supra*, 36 Cal.App.5th at p. 164.) Simply put, we are unable to discern how the abstract principles of law Diaz discusses in his opening brief pertain at all to what transpired below or to any error by the court.

Likewise, we reject Diaz's challenge to the amount of the default judgment, which is an argument raised for the first time in his reply brief. That issue has been forfeited because Barnes has had no opportunity to respond. " 'We will not ordinarily consider issues raised for the first time in a reply brief. [Citation.] An issue is new if it does more than elaborate on issues raised in the opening brief or rebut arguments made by the respondent in respondent's brief. Fairness militates against allowing an appellant to raise an issue for the first time in a reply brief because consideration of the issue deprives the respondent of the opportunity to counter the appellant by raising opposing arguments about the new issue.' " (*United Grand*, *supra*, 36 Cal.App.5th at p. 158; see also, e.g., *Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 592 ["[t]hese reply arguments are forfeited as tardy, because appellants must give the other side fair notice and an opportunity to respond"].)

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[2] Diaz's failure to include a copy of the trial court's written ruling on his motion for relief from default further impedes our review. Without a record of the court's reasoning, we are unable to make "a determination that the court abused its discretion." (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259; see also *McClain v. Kissler*, *supra*, 39 Cal.App.5th at p. 417.)

Furthermore, even if this issue had been timely and properly raised, Diaz again has failed to demonstrate error by means of a " 'cogent argument supported by legal analysis.' " (*United Grand*, *supra*, 36 Cal.App.5th at p. 162.) Although Diaz's reply brief cites law bearing on how a reasonable attorney fee may be determined, none of the caselaw he cites involves attorney fees awarded as damages pursuant to a default judgment. Indeed, he has not discussed or analyzed any law pertaining to default judgments (neither in his opening brief nor in his reply brief). We may not act as an advocate for either party by searching the record for potential error or researching the law to develop legal arguments the appellant has not put forward.

For these reasons, Diaz has failed to meet his burden on appeal to demonstrate any error by the trial court.

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.

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